Supreme Court, U.S.
FILED

No. 93-1189

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

HANJIN CONTAINER LINES, INC. (once known as Korea Shipping Corporation) for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU),

Petitioner,

vs.

TOKIO FIRE & MARINE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CORPORATION; SHIN KONG FIRE & MARINE INSURANCE CO., LTD.; COMPASS INTERNATIONAL, JANKA, LTD.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC.; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May an owner of damaged cargo elect not to sue his own Non-Vessel Operating Common Carrier (NVOCC), but sue instead the underlying vessel owner Hanjin and its vessel KOREAN WONIS ONE, invoking the terms of Hanjin's non-negotiable bill of lading on which the cargo owner was not named, and of which it was not a transferee?

2. If Hanjin is liable to cargo plaintiffs, may it nonetheless invoke a $500 per customary freight unit limitation of liability based on the terms of its bills of lading and Service Contracts with the NVOCCs?

3. Is it permitted for a ship-owning company to file an appeal in one name but two capacities, or is it necessary to assert the legal fiction that the inanimate vessel is itself a separate appellant?

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

Rule 29.1 Statement

Petitioner Hanjin Container Lines, Inc. is a corporation which has issued no shares in the United States, and is the owner of the vessel HANJIN YOSU formerly known as KOREAN WONIS ONE. There are no affiliates or subsidiaries of the petitioner.

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In The
SUPREME COURT OF THE UNITED STATES
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HANJIN CONTAINER LINES, INC. (once known as Korea Shipping Corporation) for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU),
Petitioner,

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TOKIO FIRE & MARINE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CORPORATION; SHIN KONG FIRE & MARINE INSURANCE CO., LTD.; COMPASS INTERNATIONAL, JANKA, LTD.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC.; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioner Hanjin Container Lines, Inc. respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit issued in this proceeding on October 22, 1993.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at 7 F.3d 1427 (9th Cir. 1993) and is printed here as Appendix A.

JURISDICTION

This is an action in admiralty under 28 U.S.C. § 1333(1) for damage to cargo brought before the Central District of California. Judgment was entered on March 23, 1992. Timely appeal was filed with the Ninth Circuit on April 21, 1992 within the 30 days provided by Fed.R.App.P. 4(a)(1). The decision of the Court of Appeals sustaining the District Court was filed on October 22, 1993. This petition is timely under the 90-day rule of Supreme Court Rule 20.4. The jurisdiction of the Court to review the decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(a). The writ is sought under Supreme Court Rule 17.1(a) and (c).

STATUTES INVOLVED

46 U.S.C. Appx. § 1304(5), part of the Carriage of Goods by Sea Act; 46 U.S.C. Appx. § 1702(17), part of the Shipping Act of 1984; and 49 U.S.C. § 112, part of the Pomerene Bills of Lading Act are set out in Appendix B, and are also set out in the relevant parts of the Reasons below.

STATEMENT OF THE CASE

Defendant Hanjin Container Lines, Inc. (called "Hanjin" hereafter) is an ocean common carrier, and the owner of the Korean-flag vessel known as "KOREAN WONIS ONE."

In April 1988, prior to leaving drydock after repairs in Korea, a manhole cover to a ballast wat[illegible] tank in one hold of KOREAN WONIS ONE was left open by a dockyard worker. Later that night, the vessel loaded a cargo of containers in its hold and ballasted its tanks with seawater for the trans-Pacific voyage to California. Darkness prevented the vessel's officers from discovering the open manhole cover, and the ballast water flooded the hold, inundating about 40 containers, and damaging their cargo.

KOREAN WONIS ONE proceeded to Los Angeles, discharged its cargo, and petitioned to limit its liability under 46 U.S.C. § 183 *et seq.*, claiming that the amount of its liability would eventually be limited to the fund established by the law of the vessel's flag: Korean law set a limitation fund at $415,698. The vessel's value was about $1.32 million and claims for damage amounted in total to about $1.15 million.

The District Court denied the right to limit, and the Court of Appeals for the Ninth Circuit sustained the District Court, *In re Korea Shipping Corp., Ltd.*, 919 F.2d 601 (9th Cir. 1989). Certiorari was denied in 1991 at 499 U.S. 961 (1991), and this issue is no longer alive.

On remand, all previous claimants in limitation were permitted to file suit as plaintiffs, and Hanjin *in personam* and KOREAN WONIS ONE *in rem* became the defendants. Hanjin provided security in lieu of the arrest of the vessel, and appeared personally to defend itself

and also as claimant of its vessel (or more properly, as claimant of the *res*, which by then was the substituted financial security). The various plaintiffs' actions were consolidated for most purposes and trial was held in admiralty to the Court sitting without a jury.

"Due diligence" was segregated from all contractual and damage matters, and trial on due diligence was held on April 2, 1991 and thereafter. The District Court found that, although vessel's officers had confirmed that the manhole cover was indeed closed 12 hours before leaving drydock, they should have anticipated subsequent shipyard negligence, and should have checked the manhole cover again before loading cargo. The Court found that, on the facts, the shipowner through its officers had failed to exercise due diligence at and before the commencement of the voyage, which is the applicable legal standard under the Carriage of Goods by Sea Act, 46 U.S.C. Appx. § 1300 *et seq.* The Court required an unusual level of perfection but the factual findings were not clearly erroneous, and the finding was not appealed.

Thereafter, many of the cases settled, leaving only the present plaintiffs unsatisfied. These plaintiffs had sued Hanjin and its vessel directly. Plaintiffs had not contracted with Hanjin and were not holders in due course of any Hanjin bills of lading. Instead, plaintiffs had contracted with NVOCCs (or Non-Vessel-Operating Common Carriers, a new legal entity created by the Shipping Act of 1984) and plaintiffs held, as purchasers for value in due course, only NVOCC bills of lading. These plaintiffs had not sued their NVOCCs.

Hanjin had entered into Service Contracts with various NVOCCs pursuant to which it agreed to carry their containers, regardless of contents, at a lump sum rate (of about $1300 for a 20 foot long container).

Hanjin had issued *non-negotiable* (or "straight") bills of lading to each NVOCC, naming the NVOCC as the party entitled to delivery at destination. The NVOCCs in turn had issued their own, different, *negotiable* (or "order") bills of lading to the shippers. The shippers had sold these NVOCC bills of lading to the cargo plaintiffs for value.

Eschewing their NVOCC bills of lading, and deliberately *not* naming their NVOCCs as defendants, plaintiffs sued Hanjin directly, claiming the benefit of Hanjin's non-negotiable bills of lading. Plaintiffs however were unable to produce Hanjin's bills of lading, because they had never purchased them for value, and had not otherwise become "transferees."

Hanjin denied liability to plaintiffs, contending that, under the terms of the Shipping Act of 1984 which established NVOCCs, and under all applicable case law, plaintiffs, as holders of NVOCC bills of lading, only had rights against their NVOCCs.

Hanjin also argued that because freight on its bills of lading was calculated on a lump sum basis (generally about $1300) per container pursuant to its Service Contracts with the NVOCCs, Hanjin's liability was limited to $500 per "customary freight unit" or container, pursuant to 46 U.S.C. Appx. § 1304(5).

Trial on these issues was held on February 11, 1992. The District Court, sitting without a jury, made no findings of fact or conclusions of law but entered a joint and several judgment for plaintiffs on March 23, 1992 against Hanjin and its vessel for the full amount of damages.

Timely appeal was brought.

The issue of Hanjin's direct liability to cargo owners where intermediate, but unsued, NVOCCs existed, had

not previously been addressed by the Ninth Circuit, and this was an issue of first impression. Hanjin, however, contended that *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294 (1st Cir. 1974) held that Hanjin could not be liable *in personam* directly to cargo plaintiffs, and that *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299 (2d Cir. 1984) held that KOREAN WONIS ONE (or Hanjin, as its claimant *in rem*) could not be liable *in rem* directly to cargo plaintiffs.

The Ninth Circuit sustained the District Court, holding that plaintiffs were "actual parties" to Hanjin's bills of lading because Hanjin's bill of lading definition of "Merchant" could be read to include the ultimate "owner and receiver of the Goods." The Circuit Court did not address the distinction between negotiable and non-negotiable bills of lading. The Circuit Court then found that the language of Hanjin's bill of lading limiting its liability to the "customary freight unit" was unenforceable. Hanjin was thus contractually obligated to unintended third-party beneficiaries by the terms of its bill of lading, but could not itself enforce its contract terms against the beneficiaries! The Ninth Circuit's opinion is in conflict with the opinions of the First and Second Circuits above.

Finally, after oral argument, the Court of Appeals raised *sua sponte* the *Torres*[1] issue whether KOREAN WONIS ONE was party to the appeal. After supplemental briefing but without hearing argument, the Court concluded "Although Hanjin, Inc.,[2] reminds us that it is

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[1] *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988).

[2] This is an error, the correct name being Hanjin Container Lines, Inc.

the claimant of the vessel and that it has coterminous liability with the vessel, it is not identical to the vessel and we decline to hold that a claimant and a vessel are one [and] the same for purposes [of] naming the proper parties to an appeal." The Court therefore declined to decide the *in rem* issues on the grounds that the vessel had not appealed them. This is a technical, but catastrophically misleading, legal mistake: a vessel, as an inanimate object, is susceptible of arrest but cannot itself appear. It appears *only* through its claimant, Hanjin.

REASONS FOR GRANTING THE WRIT

1. In Allowing Cargo Plaintiffs To Eschew Suit Against Their Own Non-Vessel-Operating Common Carrier And To Sue The Underlying Carrier And His Vessel Directly, The Ninth Circuit Is In Irreconcilable Conflict With The First, Second And Third Circuits As To A Matter On Which National Uniformity Is Essential.

Plaintiffs' shippers delivered their cargoes to various Non-Vessel-Operating Common Carriers, and received clean *negotiable* bills of lading. Plaintiffs purchased these bills of lading for value, and became holders in due course, with all the rights the law conveys to *bona fide* purchasers for value of negotiable commercial paper.

Eschewing their negotiable bills of lading, plaintiffs sued Hanjin and its vessel on Hanjin's *non-negotiable* bills of lading. Hanjin defended on the basis that plaintiffs are limited to suit against their NVOCCs, and also on the basis that plaintiffs were not transferees of Hanjin's non-negotiable bills of lading under 49 U.S.C.

§ 112, and had no rights thereunder. The District Court found for plaintiffs, but did not explain the theory of direct liability. The Ninth Circuit affirmed the District Court in a written opinion.

In reaching its conclusion, the Ninth Circuit recognized the existence of NVOCCs in this case and their legal status, but declined to apply the status to the facts or to address those salient decisions (from the First, Second and Third Circuits) that are opposed to the Ninth Circuit's rule of law. As a result there is a conflict between Circuits on a fundamental point of maritime cargo law, and which is aggravated by the decision of the Ninth Circuit not to address the contrary cases.

The statutory status of the NVOCC is crucial to this case. It is a deliberately created hybrid, a shipper with respect to the vessel owner, and a common carrier authorized to issue bills of lading with respect to the cargo owner.

The Non-Vessel-Operating Common Carrier was created in its present form by and is defined in the Shipping Act of 1984 as a "common carrier that does not operate the vessels by which ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. Appx. § 1702(17).

A Non-Vessel-Operating Common Carrier is defined in Federal Maritime Commission decisions and regulations as:

> "a person who holds himself out by the establishment and maintenance of tariffs, by advertisement and solicitation, and otherwise, to provide transportation for hire by water in interstate or foreign commerce as defined in the Shipping Act, 1916;

> assumes responsibility or **has liability imposed upon it by law for the safe water transportation of the shipments** and arranges in his own name with underlying water carriers for the performance of such transportation."

46 C.F.R. § 510.21(d); *Ship's Overseas Service, Inc. v. Federal Maritime Commission*, 670 F.2d 304, 307 (D.C. Cir. 1981) citing Determination of Common Carriers Status, 6 F.M.B. 245, 256-57 (1961). (Emphasis added.)

> ". . . (T)he important point about an NVOCC is that although it may not own the ships on which its customers' goods are physically transported, it nevertheless is the 'carrier' responsible for the through transportation of such goods, including the water portion."

Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc., 492 F.2d 1294, 1295 (1st Cir. 1974); see also *Federal Insurance Co. v. Transconex, Inc.*, 430 F. Supp. 290, 294-95 (D.P.R. 1976); *Hanover Insurance Co. v. Shulman Transport Enterprises, Inc.*, 581 F.2d 268 (1st Cir. 1978).

All other courts which have considered the issue, with the exception of the Ninth Circuit, agree that the NVOCC is the primary bill of lading carrier for the purposes of litigation by the injured cargo owner. *SPM Corp. v. MING MOON*, 965 F.2d 1297 (3d Cir. 1992); *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299, 301 (2d Cir. 1984); *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294, 1295 (1st Cir. 1974); *Modern Office System v. AIM Caribbean Exp.*, 802 F. Supp. 617 (D.P.R. 1992); *Ultimo Cabinet*

Corp. v. M/V MASON LYKES, offic. unrep., 1991 AMC 1343 (S.D.N.Y. 1991); *M. Prusman Ltd. v. M/V NATHANAEL*, 670 F. Supp. 1141, 1143 (S.D.N.Y. 1987); *Halm Industries Co. Inc. v. S/S TIMUR STAR*, offic. unrep., 1985 AMC 391 (S.D.N.Y. 1984).

In this respect, the Ninth Circuit is in direct conflict with uniform decisions of the other circuits, which have held that an injured cargo owner may not sue the underlying vessel owner or his vessel directly, but may only sue his own ocean carrier, the NVOCC. In *Fireman's Fund American Insurance Companies v. Puerto Rican Forwarding Co., Inc.*, 492 F.2d 1294, 1295 (1st Cir. 1974) the First Circuit held that, as a matter of law, the goods were shipped by the shipper and his assignees under the NVOCC bill of lading, and the shipper was bound by the terms of that bill of lading, and could not sue under the ocean carrier's.

In *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299 (2d Cir. 1984) the Second Circuit held that the vessel did not ratify the NVOCC's bill of lading and so did not become liable *in rem* to the NVOCC's shipper. Building on this, in *Ultimo Cabinet Corp. v. M/V MASON LYKES*, offic. unrep., 1991 AMC 1343 (S.D.N.Y. 1991) it was held that the holder of an NVOCC bill of lading had rights to sue the NVOCC, but had no legal ability to sue the ocean carrier or its vessel.

A slightly different rule may exist in the Third Circuit as a result of *SPM Corp. v. MING MOON*, 965 F.2d 1297 (3d Cir. 1992).[3] In that circuit, it is still clear that the NVOCC is the cargo owner's primary defendant, and

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[3] This case was addressed at oral argument, having come down after the briefing. It was not addressed in the Ninth Circuit's opinion.

the NVOCC contract is the primary contract of carriage, but it also appears that if the NVOCC is found to be the cargo shipper's agent, the cargo owner's rights will be further constrained by any extra terms of the ocean carrier's bill of lading.

Despite these cases, and despite acknowledging the statutory definition and role of the NVOCC, the Ninth Circuit Court of Appeals has concluded that injured cargo owners may eschew suit on their negotiable bills against their NVOCCs, and instead may sue the vessel owner and his vessel directly.

The mechanism used by the Ninth Circuit was to overlook the status of Hanjin's bill of lading as a non-negotiable document, interpreting the definitional term "Merchant" within the bill of lading to extend to plaintiffs, thereby finding, in effect but without explicitly so stating, that plaintiffs were "unnamed but intended third-party beneficiaries" of Hanjin's bill of lading. This was a conclusion of law, since it was contradicted by unopposed testimony from Hanjin that its shipping contract and freight engagement was solely with the shipper and consignee on its non-negotiable bills of lading.

In so deciding, the Circuit also ignored Hanjin's legal argument that a straight bill of lading is a contract only between the parties named on it, unless one of the parties transfers it to a third party and the ocean carrier is so notified in writing. This traditional bill of lading law was statutorily encapsulated in the Pomerene Bills of Lading Act at 49 U.S.C. § 112.[4] The Pomerene Act is

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[4] Although the Pomerene Act by its terms applies to exports, but does not address imports, the Ninth Circuit in *Portland Fish Co. v. States Steamship Co.*, 570 F.2d 628, 631-33 (9th Cir. 1974) and the Eleventh Circuit in *U.S. v. Castro*, 829 F.2d 1038, 1050 (11th Cir. 1987) have held that it applies to imports too.

explicit that the only way a third party can acquire the benefits of a non-negotiable bill of lading is to become the *bona fide* transferee *and* to "notify the carrier of the transfer." 49 U.S.C. § 112. It is undisputed that this did not happen as respects any plaintiff. The non-negotiable Hanjin bills were never transferred to them, and so no notice was possible. This statutory obstacle was surmounted by the Circuit finding plaintiffs' "acceptance of the terms of Hanjin's bills of lading" was accomplished "by filing suit"! Should certiorari be granted, there will be a subsidiary issue respecting the relative merits of negotiable and non-negotiable documents that will be inherent in the basic discussion.

The Ninth Circuit's approach greatly increases complexity and uncertainty in an area of law where predictability is essential. For many years, public policy has given specially protected status to *bona fide* purchasers for value of *negotiable* commercial paper, such as negotiable bills of lading. Cargo plaintiffs here benefit from a series of legal presumptions in any litigation against the NVOCCs who issued negotiable bills of lading: for example, a "clean" negotiable bill of lading estops the NVOCC from claiming visible pre-shipment injury existed. These were deliberately conferred benefits (today primarily encapsulated in COGSA and the UCC) designed to enhance the reliability of transfers of negotiable commercial paper, and to enhance commerce. They are well understood, internationally accepted, and rapidly enforced. *Using these presumptions, cargo plaintiffs could, and should, have sued their NVOCCs directly, and would certainly have recovered their damages in full years ago.*

By allowing cargo plaintiffs to traverse their negotiable bills of lading and to sue as unintended third-party beneficiaries of Hanjin's non-negotiable bills,

unnecessary litigation has been sponsored, with uncertain limits that can only be resolved by further litigation. Can Hanjin invoke future NVOCC bills defensively if they are advantageous? Can plaintiffs elect which bill to adopt? If the bills are contradictory, is each contradictory clause void? Is a suit to reform one bill to the other appropriate or essential? These questions inescapably must arise if the Ninth Circuit's new litigation privilege is allowed to stand.

Despite the Ninth Circuit's approach in confounding rights under negotiable and non-negotiable documents and, in the process, omitting to discuss the First, Second and Third Circuit cases respecting NVOCCs, there is an unavoidable conflict between the actual holdings of rulings of the First, Second and Third Circuits and the Ninth Circuit.

The Ninth Circuit has ruled that cargo plaintiffs may eschew their NVOCCs and sue the ocean carrier and his vessel directly on the ocean carrier's bill of lading. The First and Second Circuits hold diametrically to the opposite, and have been joined by the Third Circuit, which allows use of the ocean carrier's bill of lading to limit liability where the NVOCC is also found to be the cargo owner's agent. The Ninth Circuit's view is irreconcilable with that of the other three circuits on a point of admiralty law as to which national uniformity is traditionally controlled by this Court.

It will be impossible for maritime practitioners to address the liabilities of vessels and vessel owners in an NVOCC context without addressing the conflict. The Second Circuit's opinions carry unusual weight in admiralty cases due to the volume of litigation in the Districts of New York. However, the next most prominent maritime circuit is now the Ninth, and their opinions in

this instance are wholly opposed. This is a recipe for chaos.

The ocean carriage of goods by containers is the primary method today of moving cargo, and maritime litigation in the federal courts is overwhelmingly container-oriented. The use of NVOCCs is extremely widespread, and the decision of the Ninth Circuit on this point will only create confusion where none has previously existed.

It is not possible to evade the effects of the Ninth Circuit's opinion by modifying the terms of international bills of lading. They are not uniform in any degree, and address multifarious situations; indeed any potential modification to elide the Ninth Circuit's opinion is likely to create a problem in another jurisdiction inasmuch as no other nation has invented a non-vessel-operating common carrier.

The problem is not really susceptible of external resolution because the conflict is domestic. The underlying problem is that the Ninth Circuit's opinion on the effect of American practice under COGSA and the Shipping Act is wholly incompatible with the opinions of the First, Second and Third Circuits. Confusion will be generated in an important and active commercial area until the conflict is resolved by this Court.

2. Hanjin's Liability To Its NVOCC Of $500 Per Customary Freight Unit Should Be Enforced Against Cargo Plaintiffs.

Limitation of liability is a jugular issue in maritime cargo litigation. There are two obvious forms — the vessel limitation under 46 U.S.C. § 183 (which was

earlier denied in this case) and the unit limitation under the Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5).

The Carriage of Goods by Sea Act contains an explicit limitation of liability:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or **in case of goods not shipped in packages**, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading . . ." (Emphasis added.)

It is important to note that the statute creates two limitations:

1) the "package" limitation, and
2) for "goods not shipped in packages" the "customary freight unit" limitation.

The NVOCC accepts packages, and is therefore liable under the COGSA provision for $500 per package, and can arrange insurance to that effect and incorporate these costs in his freight charge. The NVOCC "stuffs" the packages into a container, seals it and delivers the container to the ocean carrier. The NVOCC and ocean carrier have a "Service Contract" requiring the ocean carrier to charge a unit or lump sum freight rate for each unit container. The NVOCC "ships" a container onboard Hanjin's vessel pursuant to the Service Contract.

As between the shipper and the NVOCC, the shipper shipped packages. As between the NVOCC and Hanjin, the NVOCC shipped a container, and it is generally accepted that, absent unusual facts, a 20- or 40-foot long ocean container is not a package. The NVOCC ships a container, which is not a package, and so is an instance of "goods not shipped in packages." The container becomes the "customary freight unit" as between ocean carrier and NVOCC, and this is borne out in fact by the freight terms of the Service Contract. The ocean carrier's liability to the NVOCC is $500 per customary freight unit, or container.

Such an analysis is entirely appropriate to the equities. It is appropriate because, between shipper and NVOCC, each can be insured for his own risks in proportion to the value of the cargo shipped, resulting in the cheapest insurance rates, and encouraging full disclosure. The shipper's claim is against his Non-Vessel-Operating Common Carrier. Therefore privity, notice of limitation, opportunity to declare higher value, increase in freight rates to reflect the higher value and increased liability, can all be clearly analyzed and expressed in the relationship between shipper and NVOCC. However, as between NVOCC and ocean carrier they have agreed to ship only containers, and only at pre-determined rates of freight, so that the customary freight unit would be the primary unit of liability. The NVOCC, by statutory definition a common carrier, is fully aware of the applicable limitation of value and of the effect of selecting the container as its customary freight unit, and so is not surprised or prejudiced by the statutory limit of $500 per customary freight unit.

The analysis was expressly used in *Insurance Company of North America v. S.S. AMERICAN ARGOSY*, 732 F.2d 299 (2d Cir. 1984) to explain why

public policy required a shipper to sue his NVOCC only, and why public policy did not give him rights to sue the vessel or shipowner on which the NVOCC's consolidated container was carried. The Court explained that the shipowner carrying a container of consolidated goods would have no knowledge of the identity or value of the cargo so as to arrange protective insurance if he was directly liable to the NVOCC's shipper. It was necessary, for the protection of the ocean shipping trade, to filter the ocean carrier's liability through the NVOCC who knew the nature and value of the goods.

The Ninth Circuit's opinion conflicts with this analysis. In finding that the NVOCC's customer shipped packages, and that Hanjin is directly liable to the NVOCC's customer, the Circuit Court held that Hanjin's bill of lading language and Service Contract agreements *with the NVOCC* attempting to limit its liability to the customary freight unit were null and void *as to the customer* under the provision of COGSA forbidding attempts to lessen statutory liability: 46 U.S.C. Appx. § 1303(8).

The Ninth Circuit's reasoning is only valid if its premise is valid — that the cargo owner plaintiffs here may eschew their own NVOCC contracts and may sue Hanjin directly. If plaintiffs sue derivatively, being subrogated to their NVOCC's rights and agreements, Hanjin's maximum liability should be $500 per container customary freight unit.

An opinion from this Court that would, even partially, elucidate the package and unit limitation as it applies to containers and NVOCCs would greatly assist practicing admiralty lawyers in an issue that bedevils their daily practice.

The two commercial questions for which certiorari is sought are factually clear-cut and address current, active

and burning questions in maritime commercial law. The issues are fully presented, and ripe for determination. Maritime commerce is still the primary means by which the United States imports and exports goods. The Court would be performing a widely welcomed service by resolving and explaining the appropriate legal standards to be applied as to initial liability and as to limitation of liability thereafter where NVOCCs are involved.

3. Hanjin Is A Single Entity Which Appealed In Two Capacities, As A Defendant And As A Claimant Of A *Res.*

In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988) this Court held that Fed.R.App.P. 3(c) required that the name of the party-appellant be set out with specificity in the notice of appeal: "The specificity requirement of Rule 3(c) is met only by some designation that gives fair notice of the specific individual or entity seeking to appeal." 487 U.S. at 318. The notice of appeal herein to the Ninth Circuit stated "COME NOW Hanjin Container Lines, Ltd. and Korea Shipping Corporation and appeal . . ." The vessel was not directly named, and the reason for this omission lies within admiralty procedural law.

Plaintiffs sued the inanimate vessel HANJIN YOSU *in rem*, and the vessel's corporate owner, Hanjin Container Lines *in personam*, in a single lawsuit for a single error, the wetting of cargo onboard the vessel. Hanjin provided security in lieu of the arrest of the vessel, and appeared personally to defend itself, and also as claimant of its vessel (or actually of the *res*, which was then the substituted financial security).

It is traditional law and the correct procedure that a claimant to a vessel assumes the position of defendant as

respects the complaint, and itself answers the complaint. *The TWO MARYS*, 12 F. 152 (S.D.N.Y. 1882); *accord, J.K. Welding Co. v. Gotham Marine Corp.*, 47 F.2d 332, 334 (S.D.N.Y. 1931) ("The claimant is really an actor in the litigation . . .").

Where, as here, a stipulation for value is issued, it takes the place of the vessel and the lien is transferred from the vessel to the fund: *The OREGON*, 158 U.S. 186, 208 (1895); *Overstreet v. NORKONG*, 706 F.2d 641, 643 n.2 (5th Cir. 1983).

Hanjin appeared in the lawsuit in two capacities — as the *in personam* defendant and as a claimant to the *res* (which was a fund, *not* a vessel). These liabilities were coterminous, but for convenience, Hanjin's *res* was (incorrectly) thereafter and to date identified as "KOREAN WONIS ONE."

Thereafter, a single order of judgment was entered in favor of plaintiffs and against defendant *in rem* and *in personam*. Hanjin filed a timely notice of appeal, identifying itself by name as the appellant.

The Ninth Circuit has now held that "Although Hanjin Container Lines, Inc., reminds us that it is the claimant of the vessel and that it has coterminous liability with the vessel, it is not identical to the vessel and we decline to hold that a claimant and the vessel are one [and] the same for purposes [of] naming the proper parties to the appeal."

This is an erroneous statement of law in admiralty, and will certainly seriously disrupt a well-recognized set of procedures. At all times in admiralty the claimant and the vessel (or *res*) are one and the same. It is also in conflict with analogous decisions from the Fifth and Tenth Circuits holding that, under *Torres*, a single person having dual capacities is not required to identify

the capacities in which he is acting in the notice of appeal.

Hanjin Container Lines contends that it is appealing in two capacities — as defendant, and as claimant of HANJIN YOSU's security fund, and that it did not need to specify the distinct capacities. The Ninth Circuit instead has resurrected the legal fiction of the vessel as an independent entity subject to independent liability separate from that of its owner, and has found that the vessel did not appeal. This is a mechanistic approach, and outdated.

This Court has, on several occasions, warned lower courts that insistence upon the legal fiction that a vessel has a separate existence and a separate set of liabilities will create error:

> "To say that an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. A man's liability for a demand against him is measured by the amount of the property that may be taken from him to satisfy that demand. In the matter of liability, a man and his property cannot be separated . . . . Certain parts of his property may become solely and exclusively liable for certain demands . . . and it may even be called 'the guilty thing'; but the liability of the thing is so exactly the owner's liability that a discharge or pardon extended to him will operate as a release of his property."

The CITY OF NORWICH, 118 U.S. 468, 503-04 (1885).

The Ninth Circuit in 1993 is talking in the very riddles denounced in 1885: a discharge of Hanjin *in personam* must, under the circumstances of this case, operate as a discharge of Hanjin's *in rem* liability too.

In *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960), the Court warned that it was error to consider that a single joint suit, *in rem* against a vessel and *in personam* against the owner, could really involve two separate defendants with separate interests. The Court there invoked *The CITY OF NORWICH* with approval, as well as the rule of *Consumers Import Co. v. KKK Zosenjo*, 320 U.S. 249, 254 (1943), that "[t]here could be no practical exoneration of the owner that did not at the same time exempt his property."

In light of these strictures, the Ninth Circuit's decision is in error. (Indeed, in strict legality, KOREAN WONIS ONE was never a defendant or appellant: its place had been wholly taken by the security fund which should have been, had the Ninth Circuit pursued its view to its logical ends, the separately named appellant.)

As an additional ground for certiorari, case law from the Fifth and Tenth Circuits has explained *Torres* in a fashion that is directly applicable to the instant case, and in conflict with the Ninth Circuit's views. In *King v. Otasco Inc.*, 861 F.2d 438 (5th Cir. 1988), a father, suing in both his individual capacity and as next friend of his minor children, failed to name his children in the notice of appeal. The Court found that King's children were not independent parties, so that the issue was not "the omission of a party from a notice of appeal, but only a party's failure to designate all of the ***capacities*** in which he brought suit." *Id.* at 443 (emphasis in original). After raising the *Torres* issue *sua sponte*, the Tenth Circuit in *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992) held that a mother's appeal was valid when

she had several capacities but did not name herself specifically as parent and guardian of her two sons. The Tenth Circuit expressly adopted *Otasco* for its analysis that *Torres* applies to require naming of independent parties but not to require the naming of related parties when they have common interests and appear by a single legal representative. A similar question was raised in *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990), and similarly resolved in favor of appeal by a single entity in multiple capacities.

The Ninth Circuit's application of *Torres* to a joint action *in rem* and *in personam* where the liability of the personal defendant and claimant to the *res*, Hanjin, is coterminous and interdependent strains the logic of the law, misunderstands admiralty procedure, conflicts with prior admiralty rulings of this Court and conflicts with other circuits which have ruled that *Torres* does not invalidate an appeal by one entity having several legal capacities.

The Ninth Circuit's opinion, in stating that a claimant and a vessel are not one and the same, is erroneous and can be guaranteed in due course to sow confusion and to reap discord.

CONCLUSION

The Court is requested to grant this petition for certiorari because the Ninth Circuit's decision as to bill of lading liability of Hanjin is in conflict with decisions of the First, Second and Third Circuits, while the Ninth Circuit's decision on the *Torres* question conflicts with admiralty opinions of this Court, and with analogous opinions of the Fifth and Tenth Circuits.

DATED: January 19, 1994.

Respectfully submitted,

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HANJIN CONTAINER LINES, INC. and
M/V KOREAN WONIS ONE

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ALL PACIFIC TRADING, INC., a corporation,
Plaintiff,

and

TOKIO FIRE & MARINE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CORPORATION; SHIN KONG FIRE & MARINE INSURANCE CO., LTD.; COMPASS INTERNATIONAL, JANKA, LTD.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC.; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARD INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,
Plaintiffs-Appellees,

v.

VESSEL M/V HANJIN YOSU; CRYSTAL SHIPPING LINE,
Defendants,

HANJIN CONTAINER LINE, INC.; KOREA SHIPPING CORPORATION,
Defendants-Appellants.

No. 92-55550

D.C. No. CV-89-4911 JLH

OPINION

Appeal from the United States District Court
for the Central District of California
Harry L. Hupp, District Judge, Presiding

Argued and Submitted
August 2, 1993—Pasadena, California

Filed October 22, 1993

Before: James R. Browning, Jerome Farris and Paul J. Kelly, Jr.*, Circuit Judges.

Opinion by Judge Kelly

OPINION

KELLY, Circuit Judge:

M/V Hanjin Yosu (formerly the Korea Wonis One), a vessel under Korean flag, and its owner, the Hanjin Container Line, Inc. (formerly the Korea Shipping Corp. and hereinafter referred to as Hanjin, Inc.), seek to appeal the district court's judgment in favor of numerous Plaintiffs in an admiralty action.[1] The Plaintiffs are the owners of goods, or their subrogated insurers, damaged during carriage on the Hanjin Yosu. Consolidating their arguments, Defendants appeal on two grounds: (1) Plaintiffs did not have any relationship with

*The Honorable Paul J. Kelly, Jr., United States Circuit Judge for the United States Court of Appeals-Tenth Circuit, sitting by designation.

[1]This dispute was previously before this court on the issue of the applicability of American admiralty law. *See In re Korea Shipping Corp.*, 919 F.2d 601 (9th Cir. 1990).

Defendants sufficient to create a cause of action against Defendants, because Plaintiffs transferred the goods to intermediary non-vessel operating common carriers, who then transferred the goods to Defendants; and (2) even if Defendants are liable, the district court did not correctly apply the statutory liability limitation of $500 per package or customary freight unit. Our jurisdiction arises under 28 U.S.C. § 1291 and we affirm.

Background

The nine Plaintiffs are the owners or subrogated insurers of various goods transported on the Hanjin Yosu in April 1988. Eight of these shippers did not deliver their goods directly to the Hanjin Yosu.[2] Rather, they delivered the goods to several different non-vessel-operating common carriers (NVOCCs), who issued bills of lading to the shippers. The NVOCCs then delivered the goods to the Hanjin Yosu, which issued entirely separate non-negotiable bills of lading to the NVOCCs (the "Hanjin bills of lading"). Some of the transactions involved several NVOCCs transferring the cargo to each other in succession before delivering the cargo to the vessel.

An NVOCC is an intermediary between the shipper of goods and the operator of the vessel that will carry the goods. Generally, an NVOCC combines the goods of various shippers into a single shipment, contracts with a vessel for the transportation of the goods, and delivers the goods to the vessel, usually in a sealed container. *See NLRB v. International Longshoremen's Ass'n*, 447 U.S. 490, 496 n.8 (1980). NVOCCs perform a function similar to overland freight forwarders, consolidating small shipments from multiple shippers into large, standard-sized reusable containers that can be quickly loaded on and off ships and onto trucks or other types

[2]At oral argument, Defendants conceded that one of the shippers, American Trading dealt directly with Hanjin, Inc. Defendants therefore do not dispute the issue of liability towards that Plaintiff.

of transportation. *See National Customs Brokers & Forwarders Ass'n v. United States*, 883 F.2d 93, 101 (D.C. Cir. 1989).

As defined by statute, an NVOCC is a "common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier." 46 U.S.C. App. § 1702(17). Conversely, an NVOCC is considered a carrier in its relationship with the shipper of the goods. *National Customs Brokers*, 883 F.2d at 101.

The original shipper of the cargo receives a bill of lading from the NVOCC upon delivery of the cargo to the NVOCC. The NVOCC receives an entirely separate bill of lading from the actual carrier, on which the owner of the cargo may or may not be named. In this case, the cargo owners were not named on the Hanjin bills of lading.

Once loaded on board the Hanjin Yosu, the cargo suffered $466,617 in water damage (before interest and costs) while the vessel was docked in Pusan, Korea. The damaged cargo included goods from several different shippers and NVOCCs, for which nine different bills of lading were given by the Hanjin Yosu. The Hanjin bills of lading were identical in all material respects. In the district court, the parties stipulated to the amount of damages, ownership of the cargo, and the cause of the damage. On appeal, Defendants concede the unseaworthiness of the Hanjin Yosu and their lack of due diligence to maintain the seaworthiness of the vessel.

Discussion

The case comes before the court on stipulated facts, and involves only questions of law, which we review de novo. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). Plaintiffs presented two claims to recover the damages to their goods: an in rem action against the vessel and an in personam action

against the shipowner. Defendants responded that Plaintiffs lacked a relationship with Hanjin, Inc. sufficient to support an in personam claim, and that there was no in rem jurisdiction over the Hanjin Yosu.

I. Appellate Jurisdiction over the M/V Hanjin Yosu

After the case had been submitted, we raised the issue of whether the notice of appeal conferred jurisdiction over the vessel Hanjin Yosu. The district court's judgment specifies that liability is in personam against Defendant Hanjin, Inc. *and* in rem against Defendant Hanjin Yosu, except as to the claims of three plaintiffs in which liability is only against Defendant Hanjin, Inc. in personam. The notice of appeal does not specify that the vessel is appealing:

> COMES NOW Hanjin Container Lines, Ltd. and Korea Shipping Corporation and appeal from the judgment for $466,617.97 principal and $140,575.65 interest in favor of plaintiffs on March 23, 1992. . . .

Fed. R. App. P. 3(c) requires that "[t]he notice of appeal shall specify the party or parties taking the appeal." In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Supreme Court held that the failure to name a party taking an appeal was jurisdictional. *Id.* at 314. The purpose of a specific designation is to provide notice to the court and to the opposing parties as to the identity of the appellant or appellants. *Id.* at 318. This enables appellees and the court to determine whether "a losing party not named in the notice of appeal should be bound by an adverse judgment or held liable for costs or sanctions." *Id.*

[1] Although the vessel's name appears in the caption of the notice of appeal along with other Defendants, the caption cannot be read as a designation of the vessel when the text of the notice of appeal designates specific Defendants as appellants and does not include the Defendant vessel. *See National*

Ctr. for Immigrants' Rights v. INS, 892 F.2d 814, 816-17 (9th Cir. 1989) (recognizing that it is possible to describe fewer than the entire group of potential appellants); *Allen Archery, Inc. v. Precision Shooting Equipment, Inc.*, 857 F.2d 1176, 1177 (7th Cir. 1988). *See also United States v. Tucson Mechanical Contracting, Inc.*, 921 F.2d 911, 913-914 (9th Cir. 1990). Defendant Hanjin, Inc. argues that it is appealing in two capacities—as defendant and as a claimant of the vessel, and it was unnecessary to designate either capacity in the notice of appeal. Defendant asserts that "[t]he only basis on which this Court could invoke *Torres* for the proposition that Hanjin Yosu had to be named in the appeal is if it determines that the vessel had an independent legal existence and a separate set of liabilities."

We are reluctant to collapse the distinction between the vessel and its owner in these circumstances. Generally, a vessel is viewed as a juristic person, responsible in rem for the acts and omissions of her personnel, separate and distinct from her owner. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224 (1945); *The Barnstable*, 181 U.S. 464, 467 (1901). Although the legal fiction of vessel apart from owner has not been applied when it would frustrate Congressional purpose limiting liability, *see Consumers Import Co. v. Kabushiki Kaisha*, 320 U.S. 249, 252-53 (1943); *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 502-04 (1886), or providing a convenient forum, *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23-25 (1960), plaintiffs often sue owners in personam and vessels in rem, *see Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S. Ct. 2071, 2073 (1991), urging different legal theories and remedies. *See, e.g., Melwire Trading Co. v. M/V Cape Antibes*, 811 F.2d 1271, 1273 (9th Cir.), *amended on other grounds*, 830 F.2d 1083 (1987); *Churchill v. F/V Fjord*, 892 F.2d 763, 767-772 (9th Cir. 1988) (affirming dismissal of in rem action, but reversing comparative fault allocation against in personam defendants), *cert. denied*, 497 U.S. 1025 (1990). In this case, the district court

appears to have made the distinction both in its reasoning and judgment. On appeal, we are required to examine both.

[2] In rem maritime actions are available " 'only in connection with a maritime lien.' " *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 496 (9th Cir. 1991) (quoting *Melwire Trading Co.*, 811 F.2d at 1273). Congress revised and recodified the laws regarding maritime liens in 1988. *See* 46 U.S.C. §§ 31301-31343. These revisions recognize the continued existence of maritime liens "for damage arising out of a maritime tort." 46 U.S.C. § 31301(5)(B). The owner of a vessel is an interested party, but not a necessary one. *Merchants Nat'l Bank v. Dredge Gen. G.L. Gillespie*, 663 F.2d 1338, 1346 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). "Claims not creating a maritime lien must be pursued *in personam*." *Melwire Trading Co.*, 811 F.2d at 1273 (citation omitted). Although Hanjin, Inc. reminds us that it is the claimant of the vessel and that it has coterminous liability with the vessel, it is not identical to the vessel and we decline to hold that a claimant and the vessel are one in the same for purposes naming the proper parties to an appeal. It is too late in this lawsuit to claim that the vessel was not before the court as a party and did not need to file a proper notice of appeal.

II. Plaintiffs' In Personam Claim Against The Shipowner

Defendant Hanjin, Inc. claims that Plaintiffs lack any relationship with it sufficient to support an in personam claim, arguing that Plaintiffs were neither parties to, nor transferees of, the non-negotiable Hanjin bills of lading.

Bills of lading are contracts of adhesion, usually drafted by the carrier, and are therefore " 'strictly construed against the carrier.' " *C-Art, Ltd. v. Hong Kong Islands Line America, S.A.*, 940 F.2d 530, 532 (9th Cir. 1991) (quoting *Interocean S.S. Corp. v. New Orleans Cold Storage and Warehouse Co.*, 865 F.2d 699, 703 (5th Cir. 1989)), *cert. denied*, 112 S. Ct. 1762 (1992). "[A]ny ambiguity in the bill of lading must be

construed in favor of the shipper and against the carrier. . . . ." *Institute of London Underwriters v. Sea-Land Serv., Inc.*, 881 F.2d 761, 767 (9th Cir. 1989); *cf. Pan Am. World Airways, Inc. v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1177 (9th Cir. 1977).

Plaintiffs argue, and the district court concluded, that they are actual parties to the bills of lading under the definition of "Merchant" in the bills of lading. The relevant provision of the bills of lading states:

> 'Merchant' includes the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading.

The Hanjin bills of lading do not name any individual parties as the Merchant. The bills of lading include blanks for the names of the shipper, the exporter, the consignee, the "notify parties," the forwarding agent references, and the vessel, but no blank for either the Merchant or for the owner of the goods. Thus, the only definition of Merchant included on the bills of lading is the contract definition quoted above. The failure to specifically identify a particular party as Merchant is particularly noteworthy given the fact that the bill of lading goes on to use the term Merchant approximately seventy-seven times.

Defendant claims that the definition of Merchant merely describes the various parties who *could be* Merchants. If the face of the bills of lading had named a particular party or parties as Merchants, we would find this argument persuasive. But because the bills of lading do not name any particular parties as Merchants, we must rely on the contract definition of Merchant on the reverse of the bills of lading.

Careful examination of the fine print of the bills of lading lends further support to the conclusion that the cargo owners were within the contract definition of Merchant. The only

other provision in the bills of lading that mentions specifically the cargo owner provides:

> 27. (Freight and Charges) . . .
> (4) The shipper, consignee, owner of the Goods and holder of this Bill of Lading shall be jointly and severally liable to the Carrier for the payment of all freight, charges and other amounts due the Carrier and for any failure of either or both to perform his or their obligations under the terms of this Bill of Lading and they shall indemnify the Carrier against and hold it harmless from all liability, loss, damages and expense which the Carrier may sustain or incur arising or resulting from any such failure of performance by the Merchant or either of them.

This provision unambiguously provides that the cargo owner has obligations under the bills of lading. The provision anticipates that the various parties defined as Merchants would be jointly and severally liable for freight charges. By defining Merchant broadly, the bills of lading attempt to create a broad range of parties from whom the carrier can seek payment for the shipment.

[3] Reading the entirety of the Hanjin bills of lading demonstrates the owners of the goods are parties to the bills of lading as Merchants and therefore have an in personam claim against Hanjin, Inc. Even were we to view the definition of Merchant as an ambiguous contract term, we would construe this ambiguity against the carrier under the rules of construction applicable to bills of lading.

Defendant next argues that, even if Plaintiffs are considered Merchants, Plaintiffs never took any action demonstrating acceptance of the bills of lading, as is required to become bound by their terms. *See* Aplt. Brief at 30-32. Although the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. App. §§ 1300-1315, does not contain any statutory requirement for

acceptance, Hanjin, Inc. notes correctly that, like all contracts, the bills of lading require some form of acceptance. *See e.g.*, Cal. Civ. Code § 2176 (acceptance of a domestic bill of lading constitutes assent to its terms under Article 7 of UCC). At the very least, Plaintiffs' initiation of this suit constituted acceptance of the terms of the Hanjin bills of lading. *See* 17A Am. Jur. 2d Contracts § 456 (as a basic rule of contract interpretation, a party may accept a contract by filing suit on the contract).

III. Plaintiffs' In Rem Claim Against The Vessel

The Hanjin Yosu disputes the validity of the in rem cause of action against it. Because the vessel is not a party appellant, we decline to address this point other than to restate our previous holding—the plain language of the Hanjin bills of lading establish that these cargo owners were Merchants under the bills of lading and therefore had a direct contractual relationship with the operators of the Hanjin Yosu. When a cargo owner has a direct contractual relationship with the operator of a vessel, the cargo owner has a lien on the vessel for any injury caused by the operator's lack of due diligence. *See Osaka Shosen Kaisha v. Pacific Export Lumber Co.*, 260 U.S. 490, 499 (1923); *The Keokuk*, 76 U.S. (9 Wall.) 517, 519 (1869).

IV. The Limitation Of Liability Of $500 Per Package Or Customary Freight Unit

Defendant challenges the district court's application of the statutory limitation of liability. COGSA limits the liability of carriers for cargo damaged while in transit to the United States:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . , or in case

> of goods not shipped in packages, per customary freight unit, ...

COGSA § 4(5), codified at 46 U.S.C. § 1304(5). The $500 limitation is not absolute, since shippers must be given the opportunity to declare a higher value of their shipments, and create a higher limitation of liability. *Komatsu, Ltd. v. States Steamship Co.*, 674 F.2d 806, 808-09 (9th Cir. 1982). Defining "package" under § 4(5) is a question of statutory construction, reviewed de novo. *Van Der Salm Bulb Farms, Inc. v. Hapag Lloyd, AG*, 818 F.2d 699, 701 (9th Cir. 1987).

Defendant's argument centers around the fact that an NVOCC generally does not deliver any packages to the vessel, but instead delivers a sealed container to the vessel. According to the Defendant, that container should be considered the package or customary freight unit to which the $500 limitation applies. Defendant places great weight on the fact that its rate agreements with the NVOCC are determined by the number of containers, not by the number of packages within the containers.

[4] However, the plain language of the bills of lading indicate that the carrier understood that it was shipping packages, and not containers. Under "NO. OF PKGS. OR CONTAINERS," the Hanjin bills of lading list the number of packages within each container delivered to the Hanjin Yosu. By listing the number of packages and containers, the shipper availed itself of the opportunity to clarify the liability limits. *See Universal Leaf Tobacco Co. v. Companhia De Navegacao Maritima Netumar*, 993 F.2d 414, 416-17 (4th Cir. 1993) (courts will not consider a container to be a COGSA package if bill of lading discloses number of packages within container); *Monica Textile Corp. v. S.S. Tana*, 952 F.2d 636, 639-43 (2nd Cir. 1991).

We also reject the carrier's argument that the Hanjin bills of lading define package for the purpose of the limitation of liability. The Hanjin bills of lading provide:

> 29. Limitation of Liability
> (2) . . . (ii) where the cargo has been either packed into container(s) or utilized into similar article(s) of transport by or on the behalf of the Merchant, it is expressly agreed that the number of such container(s) or similar article(s) of transport shown on the face hereof shall be considered the number of the package(s) or unit(s) for the purpose of the application of the limitation of liability provided for herein.

[5] COGSA § 3(8) provides that any contract agreement lessening the statutory liability of the carrier is null and void. 46 U.S.C. § 1303(8) The contract definition of package is neither reasonable nor consistent with the language and purpose of the statute. Listing the number of packages within each container determined the number of packages for the purpose of the limitation of liability when the NVOCCs delivered these sealed containers to the carrier. *See Universal Leaf Tobacco*, 993 F.2d at 416-17 (rejecting similar contract provision); *Shinko Boeki Co. v. S.S. "Pioneer Moon"*, 507 F.2d 342, 344-45 (2d Cir. 1974) (rejecting contract definition of "packages" as applied to bulk shipment of liquid latex); *Matsushita Electric Corp. v. S.S. Aegis Spirit*, 414 F. Supp. 894, 905 (W.D. Wash. 1976) ("If carriers alone, or even carriers and shippers together, are allowed to christen something a 'package' which distorts or belies the plain meaning of this word . . . , then the liability floor becomes illusory and negotiable"); *Cia. Panamena de Seguros, S.A. v. Prudential Lines, Inc.*, 416 F. Supp. 641, 643 (D. C.Z. 1976) (rejecting contract definition of container as package).

V. The Failure of the District Court to Make Written Findings of Fact and Conclusions of Law

Defendant claims that the district court failed to make findings of fact and conclusions of law as required by Fed. R. Civ. P. 52. Defendant first raises this issue as a grounds for appeal in its reply brief, although mention is made of it in the recita-

tion of facts contained in the opening brief. Failure to raise the issue in the opening brief waived that issue on appeal. *See Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co.*, 981 F.2d 429, 436 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 2336 (1993).

AFFIRMED.

APPENDIX B

STATUTES INVOLVED

46 U.S.C. Appx. § 1304(5), part of the Carriage of Goods by Sea Act:

> "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.
>
> "By agreement between the carrier, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: *Provided*, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than the amount of damage actually sustained.
>
> "Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading."

46 U.S.C. Appx. § 1702(17), part of the Shipping Act of 1984:

> " 'non-vessel-operating common carrier' means a common carrier that does not operate the vessels by which the ocean transportation is provided, and is a shipper in its relationship with an ocean common carrier."

49 U.S.C. § 112, part of the Pomerene Bills of Lading Act:

> "A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.
>
> "Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.
>
> "A carrier has not received notification within the meaning of this section unless

an officer or agent of the carrier, the actual or apparent scope of whose duties include action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods."

Supreme Court, U.S.
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No. 93-1189

In The

Supreme Court of the United States

October Term, 1993

HANJIN CONTAINER LINES, INC. (once known as Korea Shipping Corporation) for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU),

Petitioner,

vs.

TOKIO MARINE & FIRE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CO., LTD.; COMPASS INTERNATIONAL, INC.; JANKA, INC.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC. dba WHOLESALE WORLD; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err when it held that respondents were entitled to enforce claims for the loss of their goods under petitioner's bills of lading, which defined the parties bound by their terms to include "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading"?

2. Did the court of appeals err when it held that petitioner was not entitled to limit its liability to less than $500 per package as required by section 4(5) of the Carriage of Goods by Sea Act, when the goods were shipped in packages, the packages were stowed in containers, and petitioner's bills of lading listed the number of packages in each container?

3. Did the court of appeals err when it held that it lacked jurisdiction to review the *in rem* judgments against the ocean vessel M/V HANJIN YOSU on the grounds that the vessel and petitioner are not the same juristic person, their liabilities and the judgments against them differ, and the vessel was not named as an appellant in petitioner's notice of appeal?

4. If petitioner neither established ownership of the M/V HANJIN YOSU nor filed claim to the vessel, may it nonetheless obtain review of this jurisdictional ruling on the theory that it filed the notice in the dual capacities of defendant and claimant of the vessel?

PARTIES TO THE PROCEEDING

Some of the parties are identified incorrectly in the caption of the petition:

"Tokio Fire & Marine Ins. Co., Ltd." is Tokio Marine & Fire Insurance Co., Ltd.

"Compass International" is Compass International, Inc.

"Janka, Ltd." is Janka, Inc.

RULE 29.1 STATEMENT

The following respondents have the listed parent and subsidiary companies:

Rockwell International Corporation
- Allen-Bradley Company
- Rockwell-Collins International Inc.
- Rockwell-Graphic Systems
- Rockwell International Finance Corporation

Newell Company
- Newell Operating Company
- Newell Industries Canada, Inc.
- EZ Painter Corporation
- Masterset Brushes, Inc.
- Anchor Hocking International Corporation
- Anchor Hocking Corporation
- Sanford Corporation
- W.T. Rogers

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No. 93-1189

In The

Supreme Court of the United States

October Term, 1993

HANJIN CONTAINER LINES, INC. (once known as Korea Shipping Corporation) for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU),

Petitioner,

vs.

TOKIO MARINE & FIRE INS. CO., LTD.; FIREMAN'S FUND INSURANCE CO.; INTERNATIONAL CARGO & SURETY INSURANCE COMPANY; MALAYAN OVERSEAS INSURANCE CO., LTD.; COMPASS INTERNATIONAL, INC.; JANKA, INC.; ROCKWELL INTERNATIONAL CORP.; USA MAXAM, INC. dba WHOLESALE WORLD; A.O.K. INTERNATIONAL, INC.; NEWELL COMPANY; VSI HARDWARE INDUSTRIES; SCITECH MEDICAL PRODUCTS, INC.; AMERICAN TRADING & PRODUCTION CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JURISDICTION

Respondents are dissatisfied with the following references in petitioner's statement of jurisdiction:

(1) Supreme Court Rule 20.4 specifies the requirements for a petition seeking the issuance of a writ of habeas corpus, not a writ of certiorari.

(2) The applicable jurisdictional grant appears in 28 U.S.C. § 1254(1), not § 1254(a).

(3) Supreme Court Rule 17.1 [there are no subparts (a) and (c)] applies to actions brought within the Court's original jurisdiction.

STATUTES INVOLVED

Respondents are dissatisfied with petitioner's presentation of the statutes involved:

Neither petitioner nor any respondents are "non-vessel-operating common carriers" as defined in the Shipping Act, § 3(17), 46 U.S.C. § 1702(17) (1988). None of the rights, obligations, liabilities, causes of action or remedies asserted in this proceeding arises under any provision of the Shipping Act or falls within the Commission's jurisdiction.

As the relevant bills of lading were issued for the transportation of goods from a place in a foreign country to a place in the United States, the Pomerene Act [Federal Bills of Lading Act] does not apply. Pomerene Act, § 1, 49 U.S.C. § 81 (1988).

Petitioner's appendix includes § 4(5) of the Carriage of Goods by Sea Act ("COGSA"), §§ 1-16, 46 U.S.C. §§ 1300-1315 (1988). Respondents wish to add COGSA, § 3(4), § 1303(4), and COGSA, § 3(8), § 1303(8). These appear in appendix A of this brief.

Respondents also wish to add Rules B(1) and C of the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. Supp. R. B(1), C, 28 U.S.C. (1988). These appear in appendix B of this brief.

STATEMENT OF THE CASE

Respondents sustained losses when their cargoes aboard the M/V KOREAN WONIS ONE, later renamed the M/V HANJIN YOSU, were damaged by flooding in the ship's number three hold on the voyage from South Korea to Los Angeles, California. The crew admitted seawater to the ship's ballast tank in way of the number three hold and the water entered the hold through an open manhole used for access to the ballast tank. The manhole cover had negligently been left open several days before, but went unnoticed until after the loss.

Korea Shipping Corp., Ltd. ("Korea Shipping"), averring ownership of the vessel, filed a petition for exoneration from or limitation of liability under the provisions of 46 U.S.C. § 183 (1988), seeking to limit its liability for the resulting cargo losses to the value of the vessel and her pending freights. The district court properly denied the petition because the limitation fund exceeded the total value of all the claims for cargo loss. *In re Korea Shipping Corp.*, 1990 A.M.C. 190 (C.D. Cal. 1989), *aff'd*, 919 F.2d 601 (9th Cir. 1990), *cert. denied sub nom. Hanjin Container Lines, Inc. v. Tokio Marine & Fire Ins. Co.*, 499 U.S. 961 (1991).

After the limitation petition was dismissed by the district court, respondents sued the M/V HANJIN YOSU (since renamed) *in rem*, and brought *in personam* claims against Korea Shipping as her owner and against Korea Shipping and Hanjin Container Lines, Inc. as the carriers who issued the bills of lading for respondents' goods.

Answer was filed on behalf of Hanjin Shipping Company, Ltd. as successor to Korea Shipping and on behalf of the M/V HANJIN YOSU. Though Hanjin Shipping Company, Ltd. answered as owner of the vessel, it never filed a claim to the vessel pursuant to Fed. R. Civ. P. Supp. R. C(6). After trial, the district court entered judgments in respondents' favor against the M/V HANJIN YOSU *in rem* and against the carriers who issued the bills of lading, Korea Shipping and Hanjin Container Lines, Inc., *in personam*.

The Ninth Circuit affirmed the *in personam* judgments against petitioner and Korea Shipping, and determined *sua sponte* that it lacked jurisdiction to review the *in rem* judgments against the M/V HANJIN YOSU because the vessel had not been named an appellant in the notice of appeal. *All Pacific Trading, Inc. v. Vessel M/V HANJIN YOSU*, 7 F.3d 1427 (1993).

Now appearing for itself and for the vessel, petitioner seeks a writ of certiorari in respect of three rulings by the court of appeals: (1) that respondents were entitled to sue for their losses under petitioner's bills of lading; (2) that petitioner's liability was statutorily limited to $500 per package for the number of packages listed on each of the bills; and (3) that a vessel and her owner are not one and the same for purposes of naming the parties taking an appeal.

It is not clear who owned the M/V HANJIN YOSU or who is entitled to appear on her behalf. Korea Shipping asserted ownership in the limitation proceeding, 1990 A.M.C. 190, 919 F.2d 601, 499 U.S. 961. When Korea Shipping petitioned for certiorari, it represented that it was "now known as Hanjin Container Lines, Inc." Pet. in No. 90-1329. Yet when Hanjin Container Lines was named

in these proceedings, it answered as Hanjin Shipping Company, Ltd., which averred that it owned the vessel. Although Hanjin Shipping Company answered for the vessel, it did not file a claim to the vessel, which Fed. R. Civ. P. Supp. R. C(6) makes a prerequisite to obtaining the standing necessary to answer for the vessel. The notice of appeal identified Hanjin Container Lines, Ltd. (later "Inc.") and Korea Shipping as separate entities but did not aver that either owned the vessel. The appellants' opening and reply briefs in the Ninth Circuit were filed by Hanjin Container Lines, Ltd./Inc. and by the M/V HANJIN YOSU. As the latter was not named in the notice of appeal, the Ninth Circuit requested supplemental memoranda on the question of whether the vessel was in fact a party appellant. Hanjin Container Lines, Inc. responded that it was the vessel owner, a position it maintains on this petition.[1]

REASONS FOR DENYING THE PETITION

A. There are no reasons for a review on writ of certiorari.

The petition presents no special and important reasons for granting the writ. It conjures conflicts in the circuits where none exist. It forecasts confusion if the decision is allowed to stand. It exhorts this Court to make rulings which would in fact make changes in the law – changes which are neither indicated nor desirable to the maritime sector, and which would overrule decades, in some cases centuries, of carefully laid precedent.

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[1] Petitioner states that it was sued as the corporate owner of the vessel, Pet. at 18, but fails to advise that the answer was filed in the name of Hanjin Shipping Company, Ltd. (CR 4)

The petition reads colorfully, but the colors tend to blur. The boundary between the first and second questions is far from sharply drawn. The second question presented soon becomes the first, as the petition reverts from customary freight units to privity, Pet. at 16, and then dissolves into a generalized plea for clarification of "burning questions in maritime commercial law." Pet. at 18. What needs clarifying is the petition, not the law. Citation to authority is at best infrequent, and frequently unreliable. The Reasons for Granting the Petition include references, in question 1, to many inapposite cases and a statute which, by its own terms, does not apply.[2] No conflict or any other special and important reason is given for the presentation of question 2. Question 3, like question 1, chases after illusory conflicts with other circuits as well as with prior rulings of this court.

The rationale for the petition is even weaker. The court of appeals is charged with having decided one issue differently than the First and Second Circuits, Pet. at 6, and another differently than the Fifth and Tenth. Pet. at 21-22. The Reasons for Granting the Writ begin with an ominous heading, which reads in part, "The Ninth Circuit Is In Irreconcilable Conflict With The First, Second And Third Circuits As To A Matter On Which National Uniformity Is Essential." Pet. at 7.

National uniformity is not in issue, for the decision does not conflict with any of the cases petitioner cites from other courts of appeals. The following comparison reveals no conflicts at all. Apart from purported conflicts

---

[2] The Pomerene Act [Federal Bills of Lading Act], § 32, 49 U.S.C. § 112 (1988), does not apply to bills of lading issued in foreign countries. *See* Pomerene Act, § 1, 49 U.S.C. § 81.

that do not exist, the petition gives no special and important reasons why the decision below should be reviewed. It thus fails to meet the requirement of Sup. Ct. R. 10.1 and should therefore be denied.

1. Question 1 does not raise a conflict in the circuits.

The court of appeals in this proceeding held that respondents, as owners of the goods, were entitled to sue the ocean carrier in whose custody the goods were damaged, and to bring that suit under the ocean carrier's own bills of lading, to which they were deemed to be parties. *M/V HANJIN YOSU*, 7 F.3d at 1432. This is not in conflict with the cases petitioner cites: In *Fireman's Fund American Ins. Cos. v. Puerto Rican Forwarding Co.*, 492 F.2d 1294 (1st Cir. 1974), the First Circuit held that an ocean carrier's bills of lading did not control the contractual dispute between a shipper and a non-vessel-owning common carrier ("NVOCC") under bills of lading issued by the latter. In *Insurance Co. of North America v. S/S AMERICAN ARGOSY*, 732 F.2d 299, 302-03 (2d Cir. 1984), the Second Circuit held that a vessel was not liable *in rem* for the breach of an NVOCC's bill of lading because the NVOCC had not chartered the vessel and the vessel therefore had not ratified the bill of lading. Nowhere in its opinion did the Ninth Circuit conflict with *Fireman's Fund* or *AMERICAN ARGOSY*. It did not hold an NVOCC liable under the ocean carrier's bill of lading – or vice versa; it held the ocean carrier liable under the very bills it issued. It did not hold the HANJIN YOSU liable for breach of an NVOCC's bill of lading; it held the vessel liable for the breach of bills issued by petitioner, who was both the vessel's charterer and the ocean carrier.

Petitioner plainly equivocates about the asserted Third Circuit conflict: "A slightly different rule may exist in the Third Circuit as a result of *SPM Corp. v. MING MOON*, 965 F.2d 1297 (3d Cir. 1992)." Pet. at 10. Not so: *MING MOON* is a deviation case that does not touch on any of the questions presented for review. It has a package limitation issue, but not, as here, between packages and customary freight units; instead, between the $500 per package limitation and a higher one. Its only possible relevance to question 1 is that the Third Circuit construed the terms of the carrier's bill of lading strictly, as the law requires.[3] *MING MOON* thus held the ocean carrier bound to its own provision for a higher package limitation than the COGSA minimum. Similarly, the Ninth Circuit in this case held petitioner and Korea Shipping to their own definition of "Merchant," as discussed in section 1 below. There is no scent of conflict here.

2. Question 2 cites no authority for what it proposes, and thus raises no conflict.

Only one case is cited in petitioner's argument of question 2, *S/S AMERICAN ARGOSY*, 732 F.2d 299. *See* Pet. at 16. Petitioner cites it for the proposition that a shipper is required to sue its NVOCC and not permitted to sue the actual ocean carrier because the latter would not be able to know the contents of an ocean container and assess whether to buy insurance for its liability. Pet. at 17. This novel misinterpretation of *AMERICAN*

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[3] C-Art, Ltd. v. Hong Kong Islands Line America, S.A., 940 F.2d 530, 532 (9th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1762 (1992); Interocean S.S. Corp. v. New Orleans Cold Storage & Warehouse Co., 865 F.2d 699, 703 (5th Cir. 1989).

ARGOSY is spawned by petitioner's mistaken belief that the case permits a cargo owner to sue only the NVOCC, not the ocean carrier. As discussed above, *AMERICAN ARGOSY* holds that a vessel owner that has chartered its vessel to an ocean carrier is not bound by the terms of a bill of lading issued by an NVOCC that has not chartered the vessel. *Id.* at 302-03. The case goes on to say that a carrier, by which it presumably means a vessel owner who becomes a COGSA carrier by virtue of authorizing the chartering ocean carrier to issue bills of lading, ought not have its liability determined by the terms of numerous NVOCC bills of lading. *Id.* at 304.

Nothing in the opinion below conflicts with this. The court of appeals held petitioner and Korea Shipping – the ocean carriers who issued bills of lading – liable under their own bills of lading. No defendant, no appellant was held liable under any other bill of lading than its own.

3. Question 3 charges conflicts with rulings of this Court and of other circuit courts; the purported conflicts do not exist.

Petitioner's third question charges that this decision conflicts with Fifth and Tenth Circuit interpretations of this Court's holding in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Pet. at 21-22. Petitioner does not contend that the court of appeals departed from *Torres*, rather that it interpreted *Torres* differently than the Fifth and Tenth Circuits. The issue on this petition concerns the mechanics of taking an appeal from an *in rem* judgment against a vessel. Must the vessel be named as a party taking the appeal? Petitioner says No; the Ninth Circuit said Yes. The court of appeals held that the M/V HANJIN YOSU is a juristic person separate and distinct from her

owner and claimant, and must therefore be named as a party taking the appeal.

The pretended conflicts with Fifth and Tenth Circuit decisions are chimerical. The cited cases hold that when an individual appears in more than one capacity, as for example a plaintiff and a guardian *ad litem*, she need name herself only once in the notice of appeal, and not separately for each of her capacities. *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992); *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990), *aff'd on reh'g*, 944 F.2d 732 (10th Cir. 1991); *King v. Otasco Inc.*, 861 F.2d 438 (5th Cir. 1988). In *Torres*, however, this Court faced the very different question of whether the omission of a separate defendant's name constituted a failure to appeal. This Court ruled that this *was* a failure to appeal. The M/V HANJIN YOSU was a defendant in her own right, not a "capacity" of petitioner. She was sued *in rem* for a liability arising from a maritime lien. That lien could be enforced against the HANJIN YOSU alone, not against her owner or claimant. This was not a matter of one defendant in two capacities, but of two defendants. Thus, the ruling does not conflict with the cited decisions from other circuits.

The holding that the M/V HANJIN YOSU is a separate juristic entity from her owner, says petitioner, also "conflicts with prior admiralty rulings of this Court. . . ." Pet. at 22. These prior rulings are given as *The CITY OF NORWICH*, 118 U.S. 468 (1886) and *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960). *The CITY OF NORWICH* did not hold that a vessel is not a separate juristic entity from her owner. It held that when an owner may be liable *in personam* and its vessel may be liable *in rem* for the same loss, discharge of the owner operates to discharge the vessel as well. 118 U.S. at 503-04. Since

there was but one loss, and the vessel's liability derived from the owner's liability, the rule makes sense; but it does not make the vessel and the owner one and the same. On the contrary, long afterward this Court has continued to emphasize that the vessel is a separate juristic entity. *The THOMAS BARLUM*, 293 U.S. 21 (1934).

The FBL-585 is a different matter. When it came to enabling or frustrating the transfer of an action under 28 U.S.C. § 1404(a), this Court decided that a vessel owner should not be required to defend itself and its vessel in different fori. The Ninth Circuit expressly considered *The FBL-585* and discerned that the congressional policy favoring a convenient forum, in this Court's view, should be served despite the distinction between the vessel and her owner. *M/V HANJIN YOSU*, 7 F.3d at 1431. There is no countervailing policy, however, in Fed. R. App. P. 3(c)'s requirement that each party taking an appeal be named in the notice of appeal. It is not a matter of convenience, but of jurisdiction. The M/V HANJIN YOSU clearly and unequivocally appeared as a party in the district court. *See* the answer filed by the vessel (CR 4). She also appeared as a party in the court of appeals. *See* the opening and reply briefs. The vessel's name appeared on the briefs but was absent from the notice, thus prompting the court's determination that it lacked jurisdiction to hear the vessel's appeal. Now, says petitioner, the vessel no longer is a party, a defendant, an appellant, a separate juristic entity – she is a "capacity" of her owner.

Centuries of maritime law and the procedural rules promulgated by this Court for the enforcement of maritime liens alike view the ship as a juristic entity separate from her owner or claimant. In so holding, the court of

appeals followed the law as everyone except petitioner knows it. This is not a case "where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)(interpreting the predecessor of Sup. Ct. R. 10.1). Indeed, this is a case, like *Layne & Bowler*, where there is no conflict at all. 261 U.S. at 392. Petitioner has failed to present any special and important reason why the petition should be granted.

Besides denial because it fails to meet the requirements of Sup. Ct. R. 10.1, the petition should be denied on the merits. As discussed in the four points below, the court of appeals applied the law correctly, and its decision should not be reviewed.

B. The petition should be denied on the merits.

1. Respondents are entitled to recover for the loss of their goods under petitioner's bills of lading, which defined the parties bound by their terms to include "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading."

Respondents owned the goods that were carried and damaged aboard the M/V HANJIN YOSU. Each shipment of goods was carried from South Korea to Los Angeles under two bills of lading – one issued by an NVOCC, with whom the shipper dealt; the other, by an ocean carrier, to whom the NVOCC entrusted the goods for actual carriage aboard the ship. Two different ocean carriers – petitioner Hanjin Container Lines and Korea Shipping – issued their own bills of lading, naming as shipper the NVOCC who delivered them the goods. In

accepting petitioner's and Korea Shipping's bills of lading, the NVOCCs were acting as agents for the owners of the goods. *S/S AMERICAN ARGOSY*, 732 F.2d at 301; *Modern Office System, Inc. v. AIM Caribbean Express, Inc.*, 802 F. Supp. 617, 623 (D.P.R. 1992). The bills accepted by the NVOCCs were binding on the owners of the cargo. Respondents became bound because the NVOCCs acted as agents in delivering the goods to the actual carrier, *S/S AMERICAN ARGOSY*, 732 F.2d at 301, and because the terms of petitioner's and Korea Shipping's bills of lading so provided. *M/V HANJIN YOSU*, 7 F.3d at 1432. Each bill of lading was statutorily subject to the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315 (1988)("COGSA"); none was subject to the Pomerene Act, 49 U.S.C. §§ 81-124 (1988), as petitioner wrongly argues (Pet. at 11).

The bills of lading issued by petitioner and Korea Shipping used the term "Merchant" to describe the various parties who were or might ultimately become interested in the goods. Each bill of lading specified the rights, obligations and liabilities of the "Merchant"[4] under the bill of lading and defined "Merchant" as including "the shipper, consignor, consignee, owner and receiver of the Goods and the Holder of this Bill of Lading." 7 F.3d at 1432. Petitioner and Korea Shipping drafted the boilerplate provisions of their bills, and these were contracts of adhesion, to be "strictly construed against the carrier." *Interocean S.S. Corp.*, 865 F.2d at 703. The district court held that respondents, having proved themselves owners

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[4] The court of appeals noted that each bill of lading "goes on to use the term Merchant approximately seventy-seven times." M/V HANJIN YOSU, 7 F.3d at 1432.

of the goods carried under petitioner's and Korea Shipping's bills of lading, were "Merchants" within the meaning of those bills and were entitled to recover from the issuing carriers for the loss of their goods. The Ninth Circuit agreed. *M/V HANJIN YOSU*, 7 F.3d at 1432.

Petitioner argues that as respondents received bills of lading from the various NVOCCs to whom the goods were sent for shipment, and as the NVOCCs were named as shippers on petitioner's and Korea Shipping's bills of lading, respondents should be forced to sue the NVOCCs and be barred from suing the actual ocean carriers. Petitioner does not address the court of appeals' conclusion that respondents may sue as "Merchants" within the meaning of petitioner's and Korea Shipping's bills of lading. Rather than explain why its bills of lading should not be enforced as it wrote them, petitioner argues only that respondents did not become transferees of the bills in the manner provided by the Pomerene Act, § 32, 49 U.S.C. § 112. Pet. at 11-13.

The Pomerene Act does not apply to bills of lading issued in a foreign country. As Congress wrote it, the act applies only to bills of lading issued in the United States. Pomerene Act, § 1, 49 U.S.C. § 81; *Elgie & Co. v. S.S. S.A. NEDERBURG*, 599 F.2d 1177, 1180 (2d Cir. 1979), *cert. denied sub nom. South African Marine Corp. v. Elgie & Co.*, 444 U.S. 1072 (1980); *The CARSO*, 43 F.2d 736, 744 (S.D.N.Y. 1930), *modified on other grounds*, 53 F.2d 374 (2d Cir.), *cert. denied sub nom. Navigazione Libera Triestina v. Molinelli, Giannusa & Rao, Inc.*, 284 U.S. 679 (1931). Petitioner contends that the Ninth Circuit has held that Pomerene "applies to imports too." Pet. at 11 n.4. This is wrong. *Cf.* the case petitioner cites, *Portland Fish Co. v. States S.S. Co.*, 510 F.2d 628, 631-32 & n.7

(9th Cir. 1974)(holding that the act by its own terms does not apply to bills of lading issued in foreign countries). The Eleventh Circuit, petitioner notes correctly, has held that Pomerene applies to bills of lading issued outside the United States – a remarkable holding when compared with the language of section 1 of the act, 49 U.S.C. § 81. *United States v. Castro*, 829 F.2d 1038, 1050 (11th Cir. 1987), *modified*, 837 F.2d 441 (11th Cir. 1988). In its first opinion, the Eleventh Circuit disagrees with the literal meaning of section 1 and with decisions in which the Second and Ninth Circuits defer to that language.[5] 829 F.2d at 1050. The Eleventh Circuit later modified this ruling by elaborating reasons why it believes that "[t]he scope of section 121 [§ 41 of the act] is broader than what is expressly set out in section 81 [§ 1]." 837 F.2d at 445. Though the Eleventh Circuit's decision creates a circuit conflict about whether section 41 of the Pomerene Act applies to foreign-issued bills of lading, that conflict was created by the Eleventh Circuit, not the Ninth, and is a conflict not before this Court, despite petitioner's attempt to make it the cornerstone of its petition.

The thrust of petitioner's argument, pinned to a definition in the Shipping Act and provisions of the Pomerene Act which have no application here, is that respondents may not sue petitioner because petitioner issued nonnegotiable bills of lading. Pet. at 12-13. Negotiability, however, is unrelated to liability; it is a mechanism for transferring title. There is no question that respondents owned the goods; no question that as owners

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[5] The Ninth Circuit case that *Castro* is at pains to distinguish is in fact *Portland Fish*. *See Castro*, 829 F.2d at 1050 n.36.

they are "Merchants" under petitioner's and Korea Shipping's bills of lading. These facts entitle respondents to sue as they did. That they could also have sued the NVOCCs, whose liability for the flooding would have been vicarious, does not vitiate respondents' right to sue petitioner and Korea Shipping as "Merchants" under the express terms of their bills of lading.

Petitioner's argument that the Ninth Circuit's decision is in conflict with decisions of the First and Second Circuits, and possibly the Third, is based upon a frank misstatement of the rulings cited from those circuits. The authority with which the Ninth Circuit supposedly is at odds does not support petitioner's claims. These circuits have *not* held, as petitioner avers, "that an injured cargo owner may not sue the underlying vessel owner or his vessel directly, but may only sue his own ocean carrier, the NVOCC." Pet. at 10. As discussed in section A *supra*, pp. 7-8: (1) The First Circuit held that a shipper's suit against its NVOCC was governed by the terms of the NVOCC's bill of lading, not by those of the ocean carrier's bill. *Fireman's Fund*, 492 F.2d at 1296. (2) The Second Circuit held that a shipper could not hold the vessel owner liable for breach of the NVOCC's bill of lading since the vessel owner had not ratified or become otherwise bound to the NVOCC's bill, being bound instead to the ocean carrier's bill. *S/S AMERICAN ARGOSY*, 732 F.2d at 301-02. (3) The Third Circuit dealt with issues of deviation and package limitation, not with who may sue whom. *M/V MING MOON*, 965 F.2d 1297.

It bears adding that the district court opinion which petitioner cites as "[b]uilding on" *AMERICAN ARGOSY* does not support petitioner. It holds that the vessel owner will not be liable for the breach of the NVOCC's bill of

lading because the NVOCC is "an agent of the shipper and accordingly, merely a customer, one of many on a given voyage." *Ultimo Cabinet Corp. v. M/V MASON LYKES*, 1991 A.M.C. 1343, 1345 (S.D.N.Y. 1991)(citing *AMERICAN ARGOSY*, 732 F.2d at 301)).

None of petitioner's citations supports the argument that the cargo owner may not sue the vessel owner, the ship or the ocean carrier directly. They rule that the cargo owner may not hold them liable *under an NVOCC's bill of lading*. Subject to authorization, the ship and her owner are bound not by the NVOCC's bill but by the ocean carrier's – and may only be sued for breach of the ocean carrier's bill, as respondents sued them here. Petitioner's pretended conflict in the circuits does not exist. The only cases offered to show a conflict are plainly inapposite, and the petition should be denied.

2. Petitioner is not entitled to limit its liability to less than $500 per package as provided by section 4(5) of COGSA because the goods were shipped in packages stored in containers and petitioner's bills of lading stated the number of packages in each container.

COGSA entitles the carrier and the ship to limit liability for loss of or damage to goods to $500 per package, or $500 per customary freight unit if the goods are not shipped in packages. COGSA, § 4(5), 46 U.S.C. § 1304(5). Pet., App. B-1. Respondents' goods *were* shipped in packages. The packages were delivered to NVOCCs who loaded them into containers and delivered them to petitioner and Korea Shipping. *M/V HANJIN YOSU*, 7 F.3d at 1433. Petitioner admits that respondents

shipped the goods in packages with the NVOCCs. Pet. at 16.

Because the NVOCCs loaded packaged goods into various containers before delivering them to the ocean carriers, petitioner asserts that the carriers did not receive or carry goods shipped in packages but instead received and carried only containers. Arguing nebulously that by carrying containers they carried "goods not shipped in packages" within the meaning of COGSA § 4(5), 46 U.S.C. § 1304(5), petitioner contends that they are entitled to the limitation that COGSA provides for goods not shipped in packages – a limitation of $500 per customary freight unit. As the customary freight unit used by petitioner and Korea Shipping was the "TEU" (*i.e.*, *T*wenty-foot *E*quivalent *U*nit), a reference to twenty feet of container length, petitioner contends that their liability should be limited to $500 for twenty-foot-long containers and $1,000 for forty-foot-long containers.

The argument that packaged goods in containers are "goods not shipped in packages" is a novel argument on this petition. In the court of appeals, petitioner claimed entitlement to limited liability of $500 per container on the theory that each container *was itself a package*. The court of appeals rejected this contention because petitioner's bills of lading recited the number of packages in each container. *M/V HANJIN YOSU*, 7 F.3d at 1433. Now urging its newest theory, petitioner asks this Court to rule that as a matter of law goods shipped in packages inside a container are "goods not shipped in packages" within the meaning of COGSA § 4(5). Pet. at 16. In requesting this ruling, petitioner omits to mention that its bills of lading and those of Korea Shipping actually stated the number of packages in each container. The court of

appeals considered this fact dispositive: "[T]he plain language of the bills of lading indicate[s] that the carrier understood that it was shipping packages, and not containers." 7 F.3d at 1433.

Seeking the writ to review a question that is "ripe for determination," Pet. at 18, petitioner asks this Court to discard the fact that the bills of lading listed the number of packages carried. It asks this Court instead to find that respondents' goods, admittedly in packages when delivered to the NVOCCs, somehow ceased to be in packages on being stowed in containers, and became instead "goods not shipped in packages" within the meaning of COGSA § 4(5). Just how the packages were thus transmogrified petitioner does not say. This remains an empirical riddle.

3. The court of appeals lacked jurisdiction to review the *in rem* judgments against the M/V HANJIN YOSU because the vessel and petitioner are not the same legal entity and the vessel was not named as an appellant in petitioner's notice of appeal.

The idea that a nonsentient object can have legal capacity is, to say the least, sophisticated. Yet the concept of vessel as juristic person is one of the underpinnings of admiralty law in this country, and is as old as the Constitution. Petitioner's dismissive treatment of this concept misstates the law. In the admiralty, a vessel *is* a juristic person and may be sued as such and adjudged liable whether her owner is liable or not. A vessel's *in rem* liability for cargo loss arises from the fact that the loss occurred aboard the ship. The loss gives rise to a maritime lien. There is but one way to assert the lien: by

proceeding in the district court against the vessel *in rem*, as provided by Fed. R. Civ. P. Supp. R. A and C. *Pioneer Import Corp. v. The LAFCOMO*, 49 F. Supp. 559 (S.D.N.Y.), *aff'd*, 138 F.2d 907 (2d Cir. 1943), *cert. denied sub nom. Black Diamond Lines v. Pioneer Import Corp.*, 321 U.S. 766 (1944). The lien may not be enforced otherwise, nor against any party but the vessel. Judgment may issue only from the district court, and only against the ship, and may be enforced only against the ship or such security as has been substituted for her. Hence the "personification" of the vessel – her recognition as a juristic person, albeit inanimate property.

As inanimate property lacking sentience, a vessel cannot actively commit a tort or breach a contract. Yet she can and does become liable for the torts and contract breaches of those in lawful possession of her, as surely as if she had done them herself. *Canadian Aviator, Ltd. v. United States*, 324 U.S. 215, 224-25 (1945). The Federal Maritime Lien Act, for example, provides for liens against the vessel for the authorized furnishment of necessaries to the ship. 46 U.S.C. §§ 31341-31343 (Supp. 1989).

The ship's liability derives from her involvement in the tortious conduct or breach of contract of persons in lawful possession, *Churchill v. F/V FJORD*, 892 F.2d 763 (9th Cir. 1988), *cert. denied*, 497 U.S. 1025 (1990), *appeal after remand*, 5 F.3d 374 (9th Cir. 1993), as well as of others not so lawful, *The JOHN G. STEVENS*, 170 U.S. 113, 121 (1898). If the owner breaches a tort or contract duty in which the vessel is involved, such as colliding negligently with another ship or failing to deliver cargo in the same condition in which it was received, then the vessel is liable *in rem* for the owner's breach.

It is not necessary that the owner be liable *in personam* for the vessel to become liable *in rem*. *Cavcar Co. v. M/V SUZDAL*, 723 F.2d 1096, 1101 (3d Cir. 1983); *Merchants Nat'l Bank of Mobile v. Dredge GENERAL G.L. GILLESPIE*, 663 F.2d 1338, 1346 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982). There are breaches of duty for which a vessel will be liable and her owner not. If the owner charters the ship to another, the charterer's breach of duty will visit liability upon the ship, though not upon the owner. For example, a charterer/COGSA carrier's liability for loss of goods will make the vessel liable *in rem*, but the vessel owner's liability will depend on whether it, too, was a COGSA carrier, and that will depend on whether the carrier's bill of lading was signed on behalf of the owner or master of the vessel. *M/V SUZDAL*, 723 F.2d at 1101. Courts thus hold that owners are not bound by the charterer/carrier's bills of lading unless they authorize or ratify them, absolving the owners of liability but leaving their ships on the hook. COGSA addresses the responsibilities and liabilities of the "ship" as well as of the COGSA carrier. *See, e.g.*, COGSA §§ 3-4, 46 U.S.C. §§ 1303, 1304 (1988).

Furthermore, liens follow the vessel into new ownership, leaving the vessel exposed to *in rem* liability without fault of her new owner. Liens remain with the vessel until they are extinguished by suit *in rem*, by laches, or by judicial sale. If a vessel is sold by judicial sale, all liens not filed in the proceeding will be extinguished by the sale. *Gulf Oil Trading Co. v. Creole Supply*, 596 F.2d 515, 521 (2d Cir. 1979); *Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 866 (5th Cir. 1958). But a vessel sold privately or by a court which does not have actual possession will not be freed of liens, and the new

owner may find its vessel arrested on the basis of a presale lien. *Moran v. Sturges*, 154 U.S. 256, 285 (1894); *Thorsteinsson v. M/V DRANGUR*, 891 F.2d 1547, 1553 (11th Cir. 1990).

That the vessel can be liable *in rem* without corresponding *in personam* liability in her owner demonstrates why admiralty law for centuries has personified the vessel and viewed her as a juristic entity, rather than, as petitioner urges, mere property. Consider, for example, Chief Justice Marshall's statement of the law in dealing with a vessel declared forfeit for making a prohibited call in a foreign port:

> "This is not a proceeding against the owner; it is a proceeding against the vessel, for an offence committed by the vessel, which is not less an offence, and does not the less subject her to forfeiture, because it was committed without the authority and against the will of the owner. The Little Charles, 1 Brock. 347, 354, Fed. Cas. No. 15,612."

The JOHN G. STEVENS, 170 U.S. at 121.

Justice Story on many occasions was this Court's voice on matters of admiralty law. On one such occasion he wrote for the Court:

> "The thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing; and this, whether the offence be malum prohibitum or malum in se. The same principle applies to proceedings in rem on seizures in the admiralty."

Id. (quoting *The PALMYRA*, 25 U.S. (12 Wheat.) 1, 14 (1827)).

Again, Justice Story:

> "It is not an uncommon course in the admiralty, acting under the law of nations, to treat the

> vessel in which and by which, or by the master or crew thereof, a wrong or offence has been done, as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof."

Id. (quoting *The MALEK ADHEL*, 43 U.S. (2 How.) 210, 233-34 (1844)). For centuries the law has viewed the vessel as the offending thing, regardless of whether her owner too was at fault. When a lien born of liability arises, the defendant charged with liability is the vessel *in rem*, not her owner.

The procedure for enforcing maritime liens by suit *in rem* against offending vessels recognizes and preserves the fundamental concept of the vessel *qua* defendant. *See* the Supplemental Rules for Certain Admiralty and Maritime Claims, Fed. R. Civ. P. Supp. Rules, 28 U.S.C. (1988). This Court promulgated the admiralty rules currently in use in 1920. But the procedures for suing a vessel are much older than that:

> Congress authorized the Supreme Court to develop such rules in 1792. It reiterated the peculiar nature of admiralty law and instructed adherence to rules and usages of admiralty rather than those of common law courts.

Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion, 732 F.2d 1543 (11th Cir. 1984), *modified on other grounds on reh'g en banc*, 773 F.2d 1528 (11th Cir. 1985).

The distinction made in the supplemental rules between vessel and owner is seen most clearly by contrasting Rule C with Rule B(1). Rule C permits the arrest of a vessel to enforce a maritime lien against her. Supp. R. C(1). Rule B(1), on the other hand, provides a means of obtaining jurisdiction over the person of a defendant to a

maritime claim who is not found within the district. Supp. R. B(1).

The right to arrest and sue the ship under Rule C does not depend on a right to sue her owner. It depends solely on the existence of a maritime lien against the vessel. Nor does the Rule C arrest confer jurisdiction over the person of the owner. On the contrary, the owner or other claimant of the vessel may enter a "restricted appearance" to claim the vessel without subjecting itself to the court's jurisdiction. Supp. R. E(8). *See, e.g., Teyseer Cement Co. v. Halla Maritime Corp.*, 794 F.2d 472, 477-78 (9th Cir. 1986). Moreover, the owner of an arrested vessel is not even entitled to appear to defend the vessel unless and until it files a claim to the vessel under Supp. R. C(6). *Sanchez v. United States*, 781 F. Supp. 835, 837 (D.P.R. 1991), *aff'd mem.*, 976 F.2d 724 (1st Cir. 1992); *United States v. Certain Real Property & Premises Known as 218 Panther St.*, 745 F. Supp. 118, 120 (E.D.N.Y. 1990), *aff'd sub nom. United States v. Eng*, 951 F.2d 461 (2d Cir. 1991).

On the other hand, Rule B(1) provides a means, in a case involving an admiralty and maritime claim, to obtain personal jurisdiction over a person other than a vessel for purposes of an *in personam* claim. It provides for attachment or garnishment of the person's property in the district as a means of procuring personal jurisdiction. *See* appendix B, App. 2. This is analogous to the old *quasi in rem* jurisdiction that permitted a party to obtain personal jurisdiction by attaching a person's property. If this *quasi in rem* jurisdiction were all that the rules provided, petitioner might rightly argue that the vessel (and the substituted security) is simply its personal property, and nothing more. If petitioner's equation of the owner with the vessel and its characterization of the vessel as mere

security were correct, then Rule B(1) would be entirely sufficient, and Rule C – which contemplates suits against the vessel – would be unnecessary. The fact that Rule C exists disproves petitioner's thesis.

The liability at issue on this petition is not the owner's, but the vessel's; indeed, it is not clear who the owner is.[6] The HANJIN YOSU's liability and the resulting judgments against the vessel were based on maritime liens, and she was a defendant in her own right:

> Under traditional doctrines of maritime law, a vessel such as the S/S OLIVER DRESCHER may be held liable for its torts and contracts even though its owner may not. . . . The lien arising from such wrongs creates an interest in the vessel, which is treated as a legal entity for this purpose.

Seguros Banvenez, S.A. v. S/S OLIVER DRESCHER, 761 F.2d 855, 863 (2d Cir. 1985)(citations omitted).

> Such personification of the vessel, treating it as a juristic person whose acts and omissions, although brought about by her personnel, are personal acts of the ship for which, as a juristic person, she is legally responsible, has long been recognized by this Court.

Canadian Aviator, 324 U.S. at 224 (citations omitted).

Petitioner's argument confounds the *in rem* liability of the vessel with *quasi in rem* jurisdiction over her owner. Liability and jurisdiction are not identical, either conceptually or in the Supplemental Rules. The judgments against the M/V HANJIN YOSU may be enforced only against the vessel (now the substituted security); they may never be enforced against her owner.

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[6] *See* discussion in point 4 *infra*, pp. 27-29.

In arguing that vessel and owner are one and the same legal entity, Pet. at 19, petitioner notes that when judgments have been entered against a vessel *in rem* and against her owner *in personam*, a discharge of the judgment debt of the owner must necessarily discharge the judgment debt of the vessel *in rem*. Pet. at 21. This is correct, but not for the reason petitioner suggests. Payment of either judgment discharges the other, but not because the owner and vessel are identical; they are not. As respondents explained in the supplemental memorandum requested by the Ninth Circuit, a vessel's liability *in rem* derives from the *in personam* liability of her owner or other person in lawful possession. *F/V FJORD*, 892 F.2d at 763. Appellees' Supp. Memo. at 5 n.3. Payment of either judgment discharges the other when both judgments were based on the same loss, for which the vessel and owner were both held liable.

Having held that petitioner and the M/V HANJIN YOSU are not the same juristic entity, the Ninth Circuit applied this Court's ruling in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), and held that because the vessel was not named in the notice of appeal, there was no jurisdiction to hear the appeal from the judgment against her. This Court in *Torres* held that Fed. R. App. P. 3(c) is jurisdictional, 487 U.S. at 315, and that the failure to name a party in a notice of appeal is more than an excusable informality: "it constitutes a failure of that party to appeal." *Id.* at 314.

Petitioner charges that the determination that the M/V HANJIN YOSU was a party in the district court and was not named in the notice of appeal is in conflict with decisions of the Fifth and Tenth Circuits interpreting *Torres*. Petitioner indicates that the Ninth Circuit's ruling

conflicts with the decisions in *King v. Otasco Inc.*, 861 F.2d 438 (5th Cir. 1988), *Tinkler v. United States*, 982 F.2d 1456 (10th Cir. 1992) and *Brown v. Palmer*, 915 F.2d 1435 (10th Cir. 1990). There is no such conflict. *King*, *Tinkler* and *Brown* do not hold that a vessel defendant and her owner are one and the same party. Each concerns an individual who brought claims in the district court in more than one capacity. These cases hold that the individual need not name herself separately for each of her representative capacities in which she takes an appeal. In the case at bar, the M/V HANJIN YOSU appeared as a defendant; she appeared as well in the briefs filed in the court of appeals. Moreover, as discussed in point 4 *infra*, there is nothing in the record to show that petitioner ever qualified as the legal representative of the vessel.

4. Since petitioner did not establish that it owned the M/V HANJIN YOSU and did not file a claim to the vessel, it cannot be heard to say that it filed the notice of appeal in the capacity of claimant of the vessel.

Although it appears on this petition "for itself and for M/V KOREAN WONIS ONE (now known as M/V HANJIN YOSU)," there is no evidence that petitioner is a proper claimant to the vessel.

Petitioner states that it "appeared in the lawsuit in two capacities – as the *in personam* defendant and as a claimant to the *res* (which was a fund, *not* a vessel)."[7] Pet.

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[7] Petitioner points to the fact that security was substituted for the vessel, as contemplated by Fed. R. Civ. P. Supp. R. E(5). This does not mean, however, that the security became the defendant, as petitioner suggests. The vessel remained the

at 19. But the record below does not reflect that petitioner filed a claim to the vessel, as required by Fed. R. Civ. P. Supp. R. C(6)[*see* this brief, appendix B, App. 6]. There is no evidence of record on which petitioner may predicate its claim to the vessel or status as a claimant. There are only the contradictory averments of petitioner and another entity, Hanjin Shipping Company, Ltd., that each was the vessel owner.

The records of this proceeding and of *Hanjin Container Lines, Inc. v. Tokio Marine & Fire Ins. Co.*, 499 U.S. 461, reveal that petitioner and Hanjin Shipping Company, Ltd. simultaneously asserted – each in different proceedings in 1991 – that it was formerly known as Korea Shipping and was the owner of the M/V HANJIN YOSU (ex KOREAN WONIS ONE). Korea Shipping claimed the vessel in the limitation action, No. 90-1329, but neither petitioner nor Hanjin Shipping Company, Ltd. filed a claim to the vessel in this proceeding, though both were named as defendants herein. The record of this proceeding reflects no evidence to substantiate the contradictory averments of petitioner and Hanjin Shipping Company, Ltd. that each succeeds to the name of Korea Shipping and that each owns the vessel.

The fact that Korea Shipping filed a limitation proceeding is not sufficient to constitute a claim in the *in rem* action below. Supp. R. C(6) specifically requires the filing of a claim as a precondition to defending the vessel. Moreover, a limitation proceeding is an *in personam* action which deals only with the liability of the owner. *See In re Independent Towing Co.*, 242 F. Supp. 950, 953-54 (E.D. La.

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defendant; the security merely secured the vessel's freedom from arrest and detention *in custodia legis*.

1965); *see also* Supp. R. F and 46 U.S.C. § 181. A limitation proceeding is an equitable action, not one against the vessel and her freights. *Morrison v. Dist. Ct. of United States*, 147 U.S. 14, 34 (1893).

This Court may therefore conclude that petitioner has failed to demonstrate that it owned the vessel, or claimed the vessel, or ever acquired the status of claimant of the vessel. It should be noted that the absence of evidence of ownership does not affect a court's jurisdiction or its power to adjudicate the merits of an *in rem* claim against a vessel. For example, in *Melwire Trading Co. v. M/V CAPE ANTIBES*, 811 F.2d 1271 (9th Cir.), *amended on other grounds*, 830 F.2d 1083 (9th Cir. 1987), the district court and court of appeals addressed the liability of the vessel *in rem* where it was "not apparent from the pleadings" who the owner was. 811 F.2d at 1273.

CONCLUSION

Petitioner presents three questions for review, but fails to demonstrate a special and important reason for granting issuance of a writ of certiorari as to any one of them. In its first question, petitioner claims that the Ninth Circuit's decision conflicts with decisions of the First and Second Circuits. But there is no conflict: When two bills of lading covering the same goods are issued by different parties – the NVOCC and the ocean carrier – all these courts of appeals hold that each party may be sued only under the bill of lading that it issued. Petitioner's second question asserts that goods shipped in packages cease to be in packages when placed in a container. Petitioner cites no law for this view and does not explain why it should not be required to pay for the number of packages

specifically stated in its bills of lading. Petitioner's third question claims that the decision conflicts with prior rulings of this Court and with decisions of the Fifth and Tenth Circuits. Since the days of Chief Justice Marshall this Court has held vessels liable *in rem* regardless of the liability *vel non* of their owners, and this Court's Supplemental Rules provide the means of enforcing those claims. The cases cited from the other circuits concern individuals appearing in representative capacities. They do not address a vessel that was sued as a defendant, appeared as a defendant and appellant, and has no apparent claimant. Thus, there are no conflicts.

The petition fails to disclose any conflicts between or among circuits or with any decision of this Court, any important questions of federal law to be settled, or any other special and important reasons which would justify a writ of certiorari. Respondents request respectfully that the Court deny the petition.

DATED: February 21, 1994

Respectfully submitted,

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Attorney for Respondents

APPENDIX A

Carriage of Goods by Sea Act, § 3(4), 46 U.S.C. § 1303(4)(1988):

Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3)(a), (b), and (c), of this section: *Provided*, That nothing in this chapter shall be construed as repealing or limiting the application of any part of sections 81 to 124 of Title 49.

Carriage of Goods by Sea Act, § 3(8), 46 U.S.C. § 1303(8)(1988):

Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this chapter, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability.

APPENDIX B

Supplemental Rules for Certain Admiralty & Maritime Claims, Rule B(1), Fed. R. Civ. P. Supp. R. B:

Rule B. Attachment and Garnishment: Special Provisions

(1) When Available; Complaint, Affidavit, Judicial Authorization, and Process. With respect to any admiralty or maritime claim in personam a verified complaint may contain a prayer for process to attach the defendant's goods and chattels, or credits and effects in the hands of garnishees to be named in the process to the amount sued for, if the defendant shall not be found within the district. Such a complaint shall be accompanied by the affidavit signed by the plaintiff or the plaintiff's attorney that, to the affiant's knowledge, or to the best of the affiant's information and belief, the defendant cannot be found within the district. The verified complaint and affidavit shall be reviewed by the court and, if the conditions set forth in this rule appear to exist, an order so stating and authorizing process of attachment and garnishment shall issue. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and process of attachment and garnishment and the plaintiff shall have the burden on a post-attachment hearing under Rule E(4)(f) to show that exigent circumstances existed. In addition, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnishment or similar seizure of the defendant's property. Except for Rule E(8) these Supplemental Rules do not apply to state remedies so invoked.

Supplemental Rules for Certain Admiralty & Maritime Claims, Rule C, Fed. R. Civ. P. Supp. R. C:

RULE C. Actions in Rem: Special Provisions

(1) **When Available.** An action in rem may be brought:

(a) To enforce any maritime lien;

(b) Whenever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto.

Except as otherwise provided by law a party who may proceed in rem may also, or in the alternative, proceed in personam against any person who may be liable.

Statutory provisions exempting vessels or other property owned or possessed by or operated by or for the United States from arrest or seizure are not affected by this rule. When a statute so provides, an action against the United States or an instrumentality thereof may proceed on in rem principles.

(2) **Complaint.** In actions in rem the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

(3) Judicial Authorization and Process. Except in actions by the United States for forfeitures or federal statutory violations, the verified complaint and any supporting papers shall be reviewed by the court and, if the conditions for an action in rem appear to exist, an order so stating and authorizing a warrant for the arrest of the vessel or other property that is the subject of the action shall issue and be delivered to the clerk who shall prepare the warrant. If the property is a vessel or a vessel and tangible property on board the vessel, the warrant shall be delivered to the marshal for service. If other property, tangible or intangible is the subject of the action, the warrant shall be delivered by the clerk to a person or organization authorized to enforce it, who may be a marshal, a person or organization contracted with by the United States, a person specially appointed by the court for that purpose, or, if the action is brought by the United States, any officer or employee of the United States. If the property that is the subject of the action consists in whole or in part of freight, or the proceeds of property sold, or other intangible property, the clerk shall issue a summons directing any person having control of the funds to show cause why they should not be paid into court to abide the judgment. Supplemental process enforcing the court's order may be issued by the clerk upon application without further order of the court. If the plaintiff or the plaintiff's attorney certifies that exigent circumstances make review by the court impracticable, the clerk shall issue a summons and warrant for the arrest and the plaintiff shall have the burden on a post-arrest hearing under Rule E(4)(f) to show that exigent circumstances existed. In actions by the United States for

forfeitures for federal statutory violations, the clerk, upon filing of the complaint, shall forthwith issue a summons and warrant for the arrest of the vessel or other property without requiring a certification of exigent circumstances.

(4) Notice. No notice other than the execution of the process is required when the property that is the subject of the action has been released in accordance with Rule E(5). If the property is not released within 10 days after execution of process, the plaintiff shall promptly or within such time as may be allowed by the court cause public notice of the action and arrest to be given in a newspaper of general circulation in the district, designated by order of the court. Such notice shall specify the time within which the answer is required to be filed as provided by subdivision (6) of this rule. This rule does not affect the requirements of notice in actions to foreclose a preferred ship mortgage pursuant to the Act of June 5, 1920, ch. 250, § 30, as amended.

(5) Ancillary Process. In any action in rem in which process has been served as provided by this rule, if any part of the property that is the subject of the action has not been brought within the control of the court because it has been removed or sold, or because it is intangible property in the hands of a person who has not been served with process, the court may, on motion, order any person having possession or control of such property or its proceeds to show cause why it should not be delivered into the custody of the marshal or other person or organization having a warrant for the arrest of the property, or paid into court to abide the judgment; and, after hearing, the court may enter such judgment as law and justice may require.

(6) Claim and Answer; Interrogatories. The claimant of property that is the subject of an action in rem shall file a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee, or attorney is duly authorized to make the claim. At the time of answering the claimant shall also serve answers to any interrogatories served with the complaint. In actions in rem interrogatories may be so served without leave of court.